Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

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NO. 77-1737

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ROLOFF EVANGELISTIC ENTERPRISES, INC., RAYMOND WEATHERFORD, MRS. RAYMOND WEATHERFORD, JACK PATTERSON AND HARMON OXFORD,

Petitioners,

V.

THE STATE OF TEXAS,

Respondent

* * *

MOTION TO AFFIRM

* * *

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SUBJECT INDEX

	Page
QUESTION PRESENTED	1
STATUTE INVOLVED	2
STATEMENT	2
ARGUMENT	3

INDEX OF AUTHORITIES

CASES	PAGE
Cantwell v. Connecticut 310 U.S. 206, 303 (1940)	3
Prince v. Massachusetts 321 U.S. 158, 168, 169 (1944)	4
Reynolds v. United States 98 U.S. 145, 164 (1878)	3
Wisconsin v. Yoder 406 U.S. 212	4
STATUTES	
Article 695a-3, V.T.C.S.	2, 4
CONSTITUTION	
First Amendment	1, 3, 4

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Appellee, the State of Texas, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that the final judgment of the Supreme Court of Texas be affirmed on the ground that the federal question is so unsubstantial as not to warrant further argument.

QUESTION PRESENTED

Does the Texas Child Care Licensing Act, as construed and applied, violate the First Amendment to the Constitution of the United States by permitting state regulation of child care institutions operated by religious institutions.

STATUTE INVOLVED

This appeal raises the validity of the Texas Child Care Licensing Act of 1975, Article 695a-3, Vernon's Texas Civil Statutes. See the full text of the Texas Child Care Licensing Act of 1975 in an Appendix to Appellant's Jurisdictional Statement.

STATEMENT

This appeal stems from the grant of summary judgment of the 126th District Court of Travis County which ordered Petitioner Roloff Evangelistic Enterprises, et al, to secure state licenses to operate its child care homes. The licenses were required pursuant to the provisions of the Child Care Licensing Act, Article 695a-3, Vernon's Texas Civil Statutes, which requires in part that:

> "It is the legislative intent to protect the health, safety, and well-being of the children of the state who reside in child care facilities. Toward that end, it is the purpose of this Act to establish statewide minimum standards for the safety and protection of children in child care facilities through a program of licensing... It is the further legislative intent that the freedom of religion of all citizens shall be inviolate. Nothing in this Act shall give any governmental agency jurisdiction or authority to regulate, control, supervise, or in any way be involved in the form, manner, or content of any religious instruction or the curriculum of a school sponsored by a church or religious organization."

The Act further provides that:

> "[N]o person may operate a child care facility or child placing agency unless he holds a valid license. . ."

Petitioners contended below and contend here that they were not amenable to the licensing provisions because Roloff Evangelistic Enterprises is a religious organization, and so their child care institutions are not subject to state regulation because such regulation would impinge upon the free exercise of religion as guaranteed by the First Amendment of the Constitution of the United States.

The summary judgment in favor of Respondent State was affirmed by the Court of Civil Appeals for the Third Judicial District and Petition for Writ of Error was denied by the Supreme Court of Texas. This appeal followed.

ARGUMENT

Appellants assert that there are four substantial federal questions. In actuality, there exists only the question of whether a state statute requiring state regulation of child care institutions operated by religious institutions is in violation of the First Amendment to the Constitution of the United States.

Appellants' contention that there can be no State regulation of a child care institution which is operated by a religious organization is patently without merit and approaches the frivolous.

Under the First Amendment to the Constitution of the United States, the freedom of Petitioners to *believe* as they may see fit remains inviolate, but their freedom to *act* in society is not inviolate and is subject to reasonable regulation by a state (or the United States) for the protection of the society which extends the right of religious freedom. *Cantwell v. Connecticut*, 310 U.S. 206, 303 (1940); *Reynolds v. United States*, 98 U.S. 145, 164 (1878). Moreover, society's interest in the reasonable regulation of acts performed in accordance with

religious beliefs is broader and greater where the welfare and safety of children are involved. *Prince v. Massachusetts*, 321 U.S. 158, 168, 169 (1944).

In any case, where the interests of freedom of religion and the public welfare clash, the propriety of governmental regulation must be examined in light of the two-pronged test enunciated by *Wisconsin v. Yoder*, 406 U.S. 212 (1972), at page 214 of the opinion:

> "...it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."

The regulation of child care institutions as provided in Article 695a-3 meets either test since

(1) such regulation cannot be said to "interfere with the practice of a legitimate religious belief", and

(2) the "state interest" in the case of welfare of children residing in child care institutions is of sufficient magnitude to override the interest claiming protection under the First Amendment.

Appellants' claim that the regulation of its child care centers infringe on First Amendment rights is without merit. The judgment below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lonny Zwiener, Assistant Attorney General of Texas, hereby certify that I have served the above and foregoing Reply to Application For Writ of Error by depositing a copy of the same in the United States Mail, certified mail, return receipt requested, addressed to Mr. Clyde Jackson, 32105 Alameda, Corpus Christi, Texas 78404, and Mr. David C. Gibbs, Jr. Gibbs, Craze and Thompson, 6929 W. 130th Street, Suite 600, Parma Heights, Ohio 44130, on this the ___ day of _____, 1978.

LONNY F. ZWIENER